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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 315

FRED A. CHAPMAN and ELISE CHAPMAN, *Petitioners*

vs.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Tenth Circuit
and
BRIEF IN SUPPORT THEREOF

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FRED A. CHAPMAN and ELISE CHAPMAN, *Petitioners*

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI

Your petitioners, Fred A. Chapman and Elise Chapman, respectfully show unto the Court:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Tenth Circuit to review a decision and judgment made and entered in said Circuit Court of Appeals on the 9th day of August, 1948. (Phillips, Huxman and Murrah, Circuit Judges, sitting.) Petition for rehearing was duly filed on the 26 day of August, 1948 and denied by the court on the 30 day of

August, 1948. On application of petitioners, appellants below, the issuance of the mandate was stayed in order to afford petitioners the opportunity to apply to this Court for a writ of certiorari.

The opinion of the Circuit Court of Appeals has not been published, but will be found in the transcript of proceedings in that court.

SUMMARY STATEMENT OF MATTER INVOLVED

This cause was instituted when the United States of America filed, on October 17, 1944, in the United States District Court for the Eastern District of Oklahoma, a petition in condemnation (R. 4) to acquire 3,591.73 acres of land belonging to petitioners and located in Johnston County, Oklahoma. It was alleged that this land was needed for the construction of the Denison Dam and Reservoir, located on the Red River near Denison, Texas, the construction of which was authorized by the Act of Congress of June 28, 1938 (52 Stat. 1215). A declaration of taking was filed on October 21, 1944 (R. 9-11); and judgment on the declaration of taking was entered on the same date (R. 11). The Government deposited in court the amount of $144,250, as its estimate of compensation (R. 12-13). Three commissioners were appointed to appraise the land (R. 14), and they filed a report (R. 15). No hearings were held by the commissioners and no evidence taken by them; the manner in which they arrived at their valuation is entirely undisclosed. The cause was tried to a jury

on April 21-23, 1947. Judgment, based on the jury's verdict, was rendered on April 23, 1947, fixing the valuation of the appropriated land at $160,000 (R. 22). Petitioners prosecuted an appeal to the United States Circuit Court of Appeals, as set forth above; and this writ of certiorari is sought to review the action of the latter court in affirming the judgment below.

The land involved in this case consists of 3592 acres, located in the Washita River valley, in Johnston County, Oklahoma. It is located on both sides of the Washita River about forty miles distant from the Denison dam, and is in the upper reaches of the lake created by the dam. The Washita River runs into the Red River about twelve miles above the dam. The land taken did not comprise all the lands owned by the petitioners. The petitioners owned large bodies of land on both sides of the river, but the area taken is only that located adjacent to the river, extending from the river on both sides outward to certain lines of elevation, leaving portions further upland on both sides which are still owned by petitioners. The land taken is the heart of the bottom lands, and includes the richest and most productive lands owned by petitioners.

THE ISSUE

The only issue in this case is the sufficiency of the amount adjudged to be the value of the land. Petitioners assert that the amount is grossly inadequate.

JURISDICTION

This petition for writ of certiorari is prosecuted pursuant to Section 240 of the Judicial Code (Title 28, Section 347, United States Code); and Rule 38 of the Revised Rules of the Supreme Court of the United States, providing for review of decisions on writs of certiorari to the Circuit Courts of Appeals.

QUESTIONS PRESENTED

This proceeding being instituted by the United States to condemn private property in Oklahoma, petitioners take the position that Oklahoma law should govern matters of practice and procedure. The District Judge who presided at the trial refused to follow local law, stating very candidly, "We are not bound by the state rule" and that in *"conforming to the procedure * * * I think Federal courts have done about as they please with reference to following the state rule."* (R. 161)

Basically, then, the question is whether federal courts can ignore local law applicable to practice and procedure in condemnation suits; specifically, the questions deal with rulings of the court contrary to local law, made during the trial. Thus, the questions presented are stated as follows:

(1) Whether or not federal courts must follow local law in matters of practice and procedure in condemnation suits.

(2) Whether or not the trial court erred in limiting the number of witnesses on the principal issue in the case,—the value of the property.

(3) Whether the court erred in instructing the jury concerning the nature of the deposit of $144,000 made by the United States when the proceeding was filed, and how the amount was determined.

(4) Whether the trial court erred in admitting testimony and evidence as to whether petitioners had realized "net profits" in the operation of the appropriated lands in past years.

(5) Whether the trial court erred in permitting the Government to introduce evidence of the price paid by petitioners for portions of these lands in remote years without first laying the proper predicate therefor, as contrary to local law.

(6) Whether the trial court, after permitting the Government to introduce evidence as to purchase price of a portion of these lands at a remote time without laying the proper predicate therefor, erred in refusing to permit evidence of the price paid by a former owner, P. M. Williams, for the same land, at another time,—as affected by the local rule.

(7) Whether the trial court erred in permitting the Government to offer in evidence copies of the owner's tax rendition lists in three Oklahoma counties for impeachment purposes, the

issue being a purely collateral and immaterial matter, and in failing to apply local law.

(8) Whether the trial court erred in holding that the witness, Woody Hunt, offered by the United States as a witness on value, was qualified under the Oklahoma rule.

(9) Whether the trial court erred in instructing the jury that in determining the productivity of the land more weight should be given to evidence thereof in recent years than in years prior thereto.

REASONS FOR GRANTING THE WRIT

(1) In its decision the Circuit Court of Appeals has decided important questions of local law in a way which is in conflict with applicable local decisions.

(2) The trial court expressly refused to follow local decisions in matters of practice and procedure in this condemnation suit, all in violation of the express provisions of the applicable statute (40 U.S.C. 258), and contrary to the rule announced by this Court. *United States v. Miller*, 317 U.S. 369; *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 511; *West v. American Telephone and Telegraph Co.*, 311 U.S. 223, 237; and the Circuit Court of Appeals approved and affirmed such action by its decision which did not even discuss or mention the applicable local decisions.

(3) The trial court abused its discretion in thus refusing to follow the plain commands of the statute and decisions of this Court, and the Circuit Court of Appeals approved such acts by affirming the lower court's judgment.

(4) The Circuit Court of Appeals has sanctioned the departure of the trial court from the accepted and usual course of judicial proceedings, as aforesaid, to such an extent as to call for an exercise of this Court's power of supervision.

(5) The decision of the Circuit Court of Appeals is in conflict with decisions of other circuit courts of appeals holding that local law in matters of practice and procedure must be applied in condemnation proceedings. Similar cases from other circuits and the names of the states whose decisions were followed are:

United States v. Prettyman (Virginia) (CCA 4), 142 F. (2d) 891, 893

Mallette v. United States (Missouri) (CCA 8), 137 F. (2d) 95

United States v. 2.4 Acres of Land (Illinois) (CCA 7), 138 F. (2d) 295, 298

United States v. Federal Land Bank of St. Paul (Minnesota) (CCA 8), 127 F. (2d) 505, 506

United States v. Dieckmann (Indiana) (CCA 7), 101 F. (2d) 421, 423

United States v. Foster (Iowa) (CCA 8), 131 F. (2d) 3, 5

United States v. Delano Park Homes (New York) (CCA 2), 146 F. (2d) 473, 474

The questions presented and the reasons assigned for the allowance of the writ are more fully discussed and supported by citations of authorities in the supporting brief which follows.

WHEREFORE, petitioners, for the reasons heretofore given and hereafter argued in the brief in support of this petition for review, respectfully pray that this Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Tenth Circuit, requiring said court to certify and send to this Court a full and complete transcript of the record herein, bearing the Circuit Court of Appeals docket number 3608, styled Fred A. Chapman and Elise Chapman, Appellants vs. United States of America, Appellee, to the end that this case may be reviewed and decided by this Court as provided by law; and that the judgment and decision of the Circuit Court of Appeals and of the District Court be reversed, and this cause remanded to the District Court for a new trial; and that your petitioners have such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully presented,

JOHN M. POINDEXTER,
EARL A. BROWN,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

It is deemed unnecesary to repeat here the Summary Statement of Matter Involved, set forth in the foregoing petition. The Questions Presented in the foregoing petition are discussed in their order. Emphasis throughout this brief, unless otherwise indicated, is supplied.

(1) Whether or not federal courts must follow local law in matters of practice and procedure in condemnation suits.

The statement that the trial court failed to follow local law in matters of practice and procedure is neither theoretical nor implied. It is based not only upon the refusal of the court to follow local decisions, but also upon the expressed and avowed intent of the court to this end, made from the bench. During the trial of the case, in connection with a ruling on the admissibility of certain evidence, the trial court expressed its purpose in this behalf. The record on this point contains the following (R. 161):

> "By the Court: Now the rules in Federal Court about the admissibility of evidence is what they call the most favorable rule, the doctrine that whatever the rule permits, it is admissible, there is one instruction to follow. *We are not bound by the State rule, we are bound by a more liberal rule*, an equitable rule.
>
> By Mr. Brown: Does your Honor think the rules of Federal procedure apply to condemnation proceedings?
>
> By the Court: *Yes, as far as the evidence is concerned*, as nearly as practicable.
>
> By Mr. Brown: You are speaking now of condemnation?

> By the Court: I am talking about condemnation cases, the way it actually reads in conforming to the procedure and as nearly as practicable, *I think the Federal Courts have done about as they please with reference to following the State rule.*" (Italics ours)

Furthermore, at the outset of the trial the court advised counsel that in making objections to the evidence the grounds of the objections should not be stated (R. 48), and repeatedly during the trial the court refused to permit counsel for the landowners to state the grounds of objection or submit authorities thereon (R. 69, 72, 77, 78, 214).

In affirming the judgment of the trial court the Circuit Court of Appeals did not express itself as candidly as did the trial court about refusing to follow local decisions; it just simply ignored them. Only one Oklahoma case was cited in the opinion of the Circuit Court of Appeals, and that had only an indirect bearing upon the issue under consideration. Specifically, the refusal of both courts to follow local decisions will be discussed in the succeeding propositions.

The assignments of error raised in the Circuit Court of Appeals involved questions concerning the admissibility of evidence, qualification of witnesses, and conduct of the trial. In such matters federal courts are bound by local law. 40 U.S.C. 258; *United States v. Miller*, 317 U.S. 369; *Central Vermont Ry. Co. v. White*, 238 U.S. 507, 511.

Decisions construing the Conformity Act (28 U.S.C. 724) are applicable to the interpretation of the Condemnation Act (40 U.S.C. 258), since both acts are identical in language, as respects the application of state rules.

Furthermore, federal rules do not apply to the trial of condemnation cases, Rule 81(a)(7), Federal Rules of Civil Procedure. Thus, by positive enactment and by elimination of federal rules there is left only local law to govern such matters.

Wherever local law is applicable, it is the "duty" of federal courts "to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts." *West v. A. T. & T. Co.*, 311 U.S. 223, 237. "And the rules of decision established by judicial decisions of state courts are 'laws' as well as those prescribed by statute." *West v. A. T. & T. Co.*, supra; *Erie Railroad Co. v. Tompkins*, 304 U.S. 64.

Under the succeeding propositions there will be mentioned specifically the Oklahoma decisions which are thought to announce rules contrary to the rulings of the trial court.

(2) Whether or not the trial court erred in limiting the number of witnesses on the principal issue in the case,—the value of the property.

In the pre-trial conference of this case the district court ruled, over the petitioners' objection, that each side would be limited to three witnesses on the value of the property condemned (R. 31), but invited counsel to brief the question. The brief was submitted and thereafter certain correspondence was exchanged between the trial judge and

counsel for the landowners (R. 38-42), which was later made a part of the record (R. 48). In the judge's letter of April 10, 1947, he indicated his ruling, based on authorities none of which was from Oklahoma, and in his letter of April 17, 1947 (R. 41) it was stated definitely that he was "limiting the number of witnesses to four on each side upon that issue."

Immediately after the trial opened counsel for the landowners again called up the matter of limiting witnesses, and inquired of the court if its ruling on this point was definite. Thereupon, the court ruled that each side should be limited to four witnesses on the issue of value and stated that "both sides are allowed an exception" (R. 48).

The *main* or *principal* issue in this case was the value of the property. That was the only finding the jury was asked to make. And the issue here is whether or not a trial court may limit the number of witnesses on the main or principal issue in the case, where that issue is sharply controverted.

While the courts recognize the rule generally that a trial court in its discretion may, in certain cases, restrict the number of witnesses; and the exercise of its discretion will not be interfered with in the absence of abuse (64 C.J. 142 and authorities cited); nevertheless, by the great weight of authority, this rule is applicable only when (1) the issue on which the witnesses are limited is a collateral issue and not the main issue, and (2) the discretion exercised is an actual and judicial discretion, exercised in view of the express character and circumstances of the particular case.

A different rule prevails as to limiting the number of witnesses on the *main* or *material* fact. The weight of authority is that a trial court may not restrict the number of witnesses as to a "main, controlling and controverted fact or issue." 64 C. J. 142, and authorities cited.[1] Other authorities supporting the general rule are given in the footnote.[2]

Oklahoma follows the weight of authority. *Cope v. State*, 213 P. 753, quotes from and follows the Aubuchon case, the leading case on this point. The Aubuchon case was itself a condemnation suit where the issue was the value of the property. In the Cope case the Criminal Court of Appeals of Oklahoma said:

> "In the case of St. Louis, M. & S. Ry. Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, 9 L. R. A. (N. S.) 426, 116 Am. St. Rep. 499, 8 Ann. Cas. 822, it was held that the matter of limiting witnesses should be approached with caution. *An arbitrary rule allowing but four witnesses to a side in a damage suit, upon the issue of damage or no damage, cannot be defended.* There is a great difference between witnesses, however wisely they may be selected. The manner of some may be disappointing; their capacity to tell

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1 In 64 C. J. 142, Note 32, there are cited 37 cases in support of the general rule; Note 31 cites four cases contra.

2 Jones Commentaries on Evidence, Volume 6, page 4883; St. Louis etc. Railroad Co. v. Aubuchon, 199 Mo. 352, 97 S. W. 867, 116 Am. St. Rep. 499, 9 L. R. A., N. S., 426, 8 Ann. Cas. 822; Cope v. State (Oklahoma), 213 P. 753; Conlee v. Taylor, 153 Tenn. 507, 285 S. W. 35, 48 A. L. R. 940; Henson & Sons Coal Co. v. Strickland, 152 Ark. 203, 238 S. W. 5, 21 A. L. R. 328; Sulkowski v. Zynda, 160 Mich. 7, 124 N. W. 536, 136 Am..St. Rep. 414; Hauptman v. New York Edison Company, 145 N. Y. S. 696; Salisbury v. Goddard, 79 Or. 593, 156 P. 261; Ideal Motor Co. v. Warfield, 211 Ky. 576, 277 S. W. 862; Greene v. Phoenix Mutual Life Ins. Co., 134 Ill. 310, 25 N. E. 583, 10 L. R. A. 576; Ellis et al. v. St. Louis, I. M. & S. Ry. Co. (Mo.), 131 Mo. App. 395, 111 S. W. 839; White v. Herman, 51 Ill. 243; Hubble v. Osborn, 31 Ind. 249; 53 Am. Jur. 97 and authorities cited.

> what they know may have been miscalculated; some may withstand a searching cross-examination, while others may not. *Neither court nor counsel have the right to say in advance that justice may be met by an arbitrary assignment of four witnesses to a side on a vitally important controverted question.*"

It is true that the Cope case was not decided by the Supreme Court of Oklahoma, but there is no decision on this question by the Supreme Court, and in such case the holding of the next highest court in the state is authoritative. *West v. A. T. & T. Co.*, supra; *Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177; *Six Companies v. Highway District*, 311 U.S. 180, 188.

The reasons in support of the rule are compelling. They are that (1) a contrary rule would force the party on whom the burden of proof rests to establish a preponderance of the evidence by the same number of witnesses as is allowed his adversary,[3] and (2) such a rule would interfere in the realm where the jury reigns supreme. While preponderance of evidence is not determined alone by the number of witnesses, yet numbers are not to be ignored, and the circumstances may be such that the *number* of witnesses will be an important factor in arriving at the conclusion as to the preponderance of evidence on the whole case. 53 Am. Jur. 97.

The reasons underlying the rule that a trial court may restrict the number of witnesses, where the situation justifies it, is that otherwise a litigant could trifle with the court, cause unreasonable delays, obstruct the administration of justice, and continue the introduction of cumulative

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3 The burden of proof was on the landowner in this case and the court so instructed the jury (R. 222).

evidence indefinitely. But evidence doesn't become cumulative where the issue is sharply controverted. The administration of justice is not promoted, but retarded, by excluding material evidence on the principal, controverted issue in the case.

In its opinion the Circuit Court of Appeals refers to the correspondence between the trial judge and counsel for the landowners prior to the trial (R. 40-42), and suggests that the trial judge stated in his last letter that he might change his views on limiting the number of witnesses. However, the Honorable Circuit Court of Appeals overlooked the fact that at the opening of the trial the matter was called up again and the court definitely ruled that the witnesses on value should be limited to four on each side (R. 48), specifically allowing each side an exception to the ruling.

In its ruling on this issue the Circuit Court of Appeals ignored the Oklahoma decision of *Cope v. State*, supra. Instead. the court stated that it agreed with a statement in Wigmore on Evidence. It is respectfully submitted, however, that it was the duty of the Circuit Court of Appeals to follow the Oklahoma case and not Wigmore. It will be noted that the statement, as quoted from Wigmore, is not in accord with the weight of authority.

(3) Whether the court erred in instructing the jury concerning the nature of the deposit of $144,000 made by the United States when the proceeding was filed, and how the amount was determined.

In the cross-examination of the landowner, Fred A. Chapman, the court permitted counsel for the United States

to examine him as to the amount of the deposit made by the Government at the time the declaration of taking was filed. When counsel for the landowners objected, the trial court thereupon undertook to "explain" to the jury the nature of the deposit. Counsel again objected, but the judge proceeded with his explanation. Quoting from the record (R. 78):

> "Q. It was one hundred and forty-four thousand dollars, wasn't it?
>
> By Mr. Brown, of Counsel for Respondents: Objections.
>
> A. Yes, sir.
>
> By the Court: So that you may understand, gentlemen, when the Secretary of War made the declaration of taking and filed it with me, *before I ordered condemnation, I made them put up what was estimated to be the value of the property taken.* That could be drawn down by the man at any time he saw fit. It wasn't drawn down immediately but at the last trial—
>
> By Mr. Harris, Counsel for Plaintiff: No, it wasn't draw down immediately.
>
> By Mr. Brown, of Counsel for Respondents: Object to counsel's statements and also the Court's suggestions there.
>
> By the Court: You have the right to object but I think it is only fair *to have the jury understand how it was handled, that is the reason I explained that under the law, the State laws applied here, they put up the money and the man is given the privilege of drawing it down as he sees fit,* but the amount he drew down would have no bearing on this case on the valuation."

There can be little doubt about the impression which the jury must have received from the court's remarks. There is no ambiguity about the statement: "• • • before I ordered condemnation I *made* them put up what was *estimated to be the value of the property taken.*" It simply means that the court had had the property appraised, and that it wouldn't order condemnation until it had approved the appraisal. In other words, the jury was told, in effect, that the court had theretofore made a finding that the value of the property was $144,000.

Again, in stating to the jury that "the state laws applied here", the court, was, in effect, saying that the $144,000 was an appraisal of three commissioners. It is a well-known fact that the first step in a condemnation proceeding under Oklahoma law is to appoint three commissioners to appraise the property. 66 Okla. Stat. Ann., Secs. 53, 54, 55, 56, 57. That the jury may have logically concluded from the court's remarks that the amount deposited was an appraisal of the commissioners is not to be denied.

The Oklahoma rule, and it is the universal rule, is that in condemnation proceedings a jury may not be informed as to the amount of the award made by commissioners, and that to inform the jury of such award constitutes reversible error. *Champlin Refining Co. v. Donnell*, 173 Okla. 527, 49 P. (2d) 208; *Wichita Falls & N. W. Ry. Co. v. Munsell*, 38 Okla. 253, 132 P. 906; *St. Louis, El Reno & Western Ry. Co. v. Oliver*, 17 Okla. 589, 87 P. 423, 10 Ann. Cas. 748.

The basis of error, of course, is in *informing* the jury of estimates or appraisements made by others. The rule is violated in spirit just as much by permitting evidence of the award made by government appraisers as by the commissioners appointed by the court. The jury in this case may not have known just who made the award (the court told them it was made under State laws), but they did know that it was an "estimate" made under the sanction of the court. The amount of $144,000 represented an estimate of the value of the land made by somebody and approved by the court. It is impossible, therefore, to say that the jury were not influenced by this.

In its opinion the Circuit Court of Appeals held that the instruction of the court to the effect that the amount of the deposit should not be considered as having a "bearing" on valuation of the property cured the error. The rule that a court may *sometimes* cure an error by withdrawing evidence from a jury applies only where the evidence was admitted in good faith and then later withdrawn when the court is convinced its introduction was erroneous. That wasn't the case here. The trial judge knew it was improper to inform the jury as he did, even before he told them, because in the same breath in which he gave the information he told them not to consider it. Clearly the trial court's statements constituted an abuse of discretion.

Again, the error becomes even more prejudicial in its effect when it is considered that the trial court had theretofore limited the parties to four witnesses on each side,

and the effect of giving this information to the jury was to place before them the appraisal of the three commissioners in addition to the four witnesses who testified on behalf of the Government in the case. Again, the court's remarks were equivalent to making the court itself a witness on value in violation of its own rule limiting the number of witnesses.

Moreover, an instruction to disregard evidence will not cure the error in admitting it where "considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court." *Anglo-Texas Oil Co. v. Manatt*, 125 Okla. 92, 256 P. 740; *Waldron v. Waldron*, 156 U. S. 361, 383; *Throckmorton v. Holt*, 180 U. S. 552. That the court's statements made a strong impression and had a lasting effect upon the minds of the jury is not to be denied. And they were so wholly unnecessary as to constitute abuse of discretion. "The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'." *Quercia v. United States*, 289 U. S. 466, 470.

Finally, the court did not instruct the jury to disregard its statement. What the judge said was that the act of drawing down the money had no bearing on the case. There was no instruction to disregard the judge's appraisement. An instruction to disregard must be direct,

explicit, and unequivocal. 5 C. J. S. 1034, and authorities cited.

(4) Whether the trial court erred in admitting testimony and evidence as to whether petitioners had realized "net profits" in the operation of the appropriated lands in past years.

Nearly two hundred pages of the record in the Circuit Court of Appeals (pp. 257 to 445, inclusive) were required to show the individual income tax returns of the landowners. The purpose in offering the returns was to show that the landowners had made little profit out of the lands during prior years, commencing with the depression year of 1936. Also counsel for the Government was permitted to cross-examine the landowner at length on the issue of whether he had made a "net profit" on the lands. Objection was made to the introduction of any evidence as to whether or not "net profits" had been realized from the lands in controversy.

There were two reasons why such evidence was inadmissible and its admission prejudicial. In the first place, the returns show on their face that as far as income from lands is concerned, the income reported is shown in a lump sum as derived from all of the lands owned by the Chapmans, exceeding 20,000 acres. There is no segregation of income as to the 3592 acres which the Government has carved out of the holdings of the Chapmans. The returns and Chapman's testimony disclose that the business of Chapman was primarily a cattle business; that he sold no produce from his farms; that he raised mostly corn and fed that corn to his cattle, and that whether

or not he made a profit depended upon the sale of the cattle. Whether he could sell the cattle at a profit, of course, depended largely upon the vagaries of a fluctuating market. Also, whatever increased value was derived from the cattle depended upon many different circumstances and conditions. A part of such value would be attributed to the running of the cattle on grass during the summer time, and none of the ranch land was included in this condemnation proceeding. Therefore, it was utterly impossible to determine from these returns the particular amount of income which had been derived from the lands under condemnation. Profits or losses reflected by the returns may have been due primarily to the lands involved in the proceeding, or to other lands. These matters could have been pointed out to the court at the time the returns were offered, and counsel for petitioners pleaded with the court for an opportunity to make these disclosures, but the court refused to hear (R. 77).

A further and more comprehensive ground for inadmissibility of such evidence is based on the general remoteness and speculativeness of this character of testimony. The rule is universal that any evidence purporting to show whether or not a landowner made a profit from the use of lands is not admissible in a proceeding to determine the value of such lands in condemnation.

In 7 A. L. R. 164, the authorities on this point are collated under the following proposition:

> "With remarkable unanimity the American jurisdictions hold that evidence of profits derived from a

> business conducted on property is too speculative, uncertain, and remote to be considered as a basis for computing or ascertaining the market value of the property in condemnation proceedings."

Among the many cases which support this rule are those shown in the footnote.[4]

There is no Oklahoma authority definitely in point on this question. It is submitted, however, that Oklahoma would follow a rule of "remarkable unanimity", Title 12, Okla. Stat. Ann., Sec. 2; *Harness v. Myers*, 143 Okla. 147, 288 P. 285; 21 C. J. S. 354; and furthermore, the case of *City of Cushing v. Pote*, 128 Okla. 303, 262 P. 1070, in holding that productivity, quantity and price of crops might be shown as evidence of land valuation impliedly rejects evidence as to net profits, which involve such varying circumstances as business acumen, nature of the season, price of labor, fluctuating conditions, etc.

The court permitted all of this evidence to be introduced and it remained before the jury for two days, when the court finally withdrew the evidence from the jury (R. 169). At the time the evidence was offered counsel for the landowners asked permission to be heard on the issue of admissibility, but was denied this privilege by the court

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4 United States v. Meyer, 113 F. (2d) 387, 397 (CCA 7); Lehigh Valley Coal Co. v. City of Chicago, 26 F. 415, 417; Gauley & Eastern Railway Co. v. Conley, 100 S. E. 290, 7 A. L. R. 157; In re Smith St. Bridge in City of Rochester, 255 N. Y. S. 801, 807; River Park Dist. v. Brand, 327 Ill. 294, 158 N. E. 687; Forest Preserve Dist. of Cook County v. Hahn, 341 Ill. 599, 173 N. E. 763, 765; Accomac Realty Co. v. City of St. Louis et al., 347 Mo. 1224, 152 S. W. (2d) 100, 102, 103; James Poultry Co. v. Nebraska City, 135 Neb. 787, 284 N. W. 273, 278, 279; City of Bellevue v. Stedman et al., 63 Ohio App. 150, 25 N. E. (2d) 695, 698; Pemberton v. City of Greensboro, 208 N. C. 466, 181 S. E. 258, 260; City of Cushing v. Pote, 128 Okla. 303, 262 P. 1070.

(R. 77). Thereafter, counsel obtained permission to state the grounds of his objection in writing and filed them with the clerk (R. 20). Following this, the court examined the landowner, Chapman, on this issue and concluded from the testimony of Chapman that the income tax returns were inadmissible on the issue of "net profits" (R. 169).

Nevertheless, the court permitted the income tax returns to remain before the jury on the issue, as stated by the court, of how much stock the owners had on hand the first of every year (R. 169-170). The returns, however, did *not* show the number of stock on hand, and besides this was an immaterial issue. Thus, the returns were permitted to remain before the jury throughout the trial for all practical purposes. It is submitted that this was both erroneous and an abuse of discretion. An instruction to disregard improper evidence cannot cure the error in admitting it, if the evidence is of such prejudicial character that it must be assumed that injury resulted. *School District No. 39, Mayes County v. Hicks*, 138 Okla. 143, 280 P. 606, 65 A. L. R. 1092; *Anglo-Texas Oil Company v. Manatt*, 125 Okla. 92, 256 P. 740.

(5) Whether the trial court erred in permitting the Government to introduce evidence of the price paid by petitioners for portions of these lands in remote years without first laying the proper predicate therefor, as contrary to local law.

In the cross-examination of the landowner, Fred A. Chapman, counsel for the Government interrogated him about the price he paid as purchase price for a number of

the tracts involved in this proceeding (R. 72, 74, 75, 151, 152, 167, 168, 171, 172, 173, 174, 175). Particular emphasis was placed upon a tract of 481.86 acres (R. 72, 74, 75) purchased in October 1936. The purchase price of this land was $7,200. Objection was made to this testimony, but the trial court held it would be admissible, holding that the purchase price could be considered by the jury as evidence of its present value but that the weight of the evidence might be affected by the time the purchase was made (R. 72, 152).

It is the general rule that evidence of the purchase price of land is not admissible to prove the value of the land unless (1) the price is paid as a part of a voluntary and bona fide transaction, (2) the purchase must have taken place at a time not too remote from the time as of which the property is to be valued, and (3) conditions in the interim must have remained substantially the same. 31 C. J. S. 886; *Thompson v. Boydstun*, 189 Okla. 530, 118 P. (2d) 236. The trial court held that evidence of the purchase price was admissible, without requiring the proper predicate to be laid for its introduction. It held that the jury might consider the evidence of the purchase price regardless of the time the purchase was made or whether there was a showing that conditions had remained substantially the same during the interim.

This was contrary to the general rule, and Oklahoma follows the general rule. *Thompson v. Boydstun*, supra. In this case the Supreme Court of Oklahoma held that a purchase price of land "standing alone" furnishes "no

evidence" as to value. The Corpus Juris rule is discussed and approved therein.

It will be seen that both the trial court and the Circuit Court of Appeals refused to follow the Oklahoma rule.

It should also be noted that this same Circuit Court of Appeals has twice held that the admissibility of evidence under the pleadings is a matter respecting the remedy and is governed by the law of the place where the suit is brought. *Pure Oil Pipe Line Co. v. Ross* (CCA 10), 51 F. (2d) 925; *Harper v. Wilson* (CCA 10), 46 F. (2d) 785. In these cases the court was construing the Conformity Act, but the language construed is exactly the same as that included in the Condemnation Act. Both of these cases were cited in the briefs and petition for rehearing, but they were ignored along with the Oklahoma case. In its opinion the Circuit Court of Appeals said, with reference to this issue, that "the more remote the testimony, the less weight should be given it." If petitioners interpret the court's opinion on this point correctly, the holding was that an error in *admitting* evidence may be cured by merely instructing the jury to give *"less weight"* to it. No authority has been discovered for such a rule, but much has been found to the contrary.

Further, in its opinion the Circuit Court of Appeals said:

> "At first blush, it does seem that the trial court discriminated in favor of the Government on the admission of evidence of sales. But the 1936 and 1939

sales complained of were developed on cross examination to impeach the landowner's direct testimony."

With this statement petitioners take respectful, but vigorous issue. The direct examination of the landowner, Chapman, is shown in the record, pages 53 to 65, inclusive. An examination of this testimony will show that the Circuit Court of Appeals was in error in this statement. *There isn't a word in this direct testimony concerning sales or purchases of land.* Hence, there was nothing to impeach. The issue was raised for the first time on cross-examination of Chapman by Government counsel, and then over the objections of petitioners (R. 72). The trial court did not admit the testimony on the basis that it was offered for impeaching purposes, but because the court thought it had some bearing on the value of the land in 1944 (R. 72, 152). This error was called to the attention of the Circuit Court of Appeals on petition for rehearing, but was either overlooked or ignored. The petition for rehearing was overruled four days after it was filed.

The effect of permitting the introduction of such evidence was highly prejudicial. Its admission was an invitation to the jury to consider it as bearing on the valuation in 1944. Yet prices paid in the depression year of 1936 could have had nothing but a prejudicial effect on the value of the land in 1944, when land values were the highest they had been in a generation. A Government witness testified that land values increased thirty-five per cent between 1939 and 1944 (R. 202). The percentage of increase between the depression year of 1936 and 1944 was certainly much greater.

(6) Whether the trial court, after permitting the Government to introduce evidence as to purchase price of a portion of these lands at a remote time without laying the proper predicate therefor, erred in refusing to permit evidence of the price paid by a former owner, P. M. Williams, for the same land, at another time,—as affected by the local rule.

The facts in connection with this question concern the 481.86 acre tract referred to under the preceding question. One P. M. Williams had purchased this land in 1917, and 1921, 130 acres being purchased in 1917, and the remainder, approximately 350 acres, in 1921. In those years conditions more nearly approximated those which existed in 1944, with reference to land value and business conditions generally, than did conditions in 1936. Williams later lost the land through foreclosure, and Chapman purchased the land from a Joint Stock Land Bank, which was the mortgagee and also the purchaser at the foreclosure sale.

Williams testified in a former trial of this case that he paid $100 per acre for the land when he purchased it, and thereafter placed valuable improvements on the land (R. 179). After the court had ruled that the price paid for land was admissible on value in 1944 regardless of the time of purchase, and after the Government had brought out testimony as to what the landowner paid for this land in 1936, petitioners offered the transcript of the testimony of Williams taken in the former proceeding (R. 179). It is the rule that after a court permits one side to introduce evidence of a certain character, it is error to deny the other

side the same privilege, even though the introduction of such evidence is erroneous in law, *Shawnee Gas & Electric Co. v. Griffith*, 96 Okla. 261, 222 P. 235; *Hines v. Pershin*, 89 Okla. 297, 215 P. 599; and the failure to permit the introduction of such evidence is reversible error. *Haddock v. Shelton*, 142 Okla. 202, 286 P. 329, 335; *Broswood Oil Co. v. Sand Springs Home*, 178 Okla. 550, 62 P. (2d) 1004; 20 Am. Jur. 264 and authorities cited.

It isn't necessary to imply the reasons of the trial court for excluding the Williams testimony. These reasons were dictated by the court into the record at the time it denied the tender and were: (1) "his deposition was not taken", and (2) "it is a violation of the court's limitation of witnesses heretofore made." (R. 179) Without challenging the sincerity of the court, it will be observed that the only limitation of witnesses made by the court was on witnesses on the issue of value, and Williams did not testify on that issue. As to the failure to take the deposition, under Oklahoma law the taking of a deposition is unnecessary where the testimony of a witness taken at a former trial is offered, provided an attempt has been made to secure the attendance of the witness by subpoena, which was done in this case (R. 42). *Atchison, T. & S. Ry. Co. v. Baker*, 37 Okla. 48, 130 P. 577; *Caldwell v. Kuykendall*, 94 Okla. 84, 221 P. 84; *King Auto Service v. Hodges*, 143 Okla. 260, 288 P. 483. Such testimony is considered to be a "deposition" under Oklahoma law. *Kansas City, M. & O. Ry. Co. v. Roe*, 72 Okla. 238, 180 P. 371.

In refusing to admit the Williams testimony the trial court clearly discriminated against the landowners, as is

even suggested in the opinion of the Circuit Court of Appeals. Also, it again refused to follow the clear, positive rule of local law. This court has said that since *Erie R. R. Co. v. Tompkins*, 304 U. S. 64. there has been placed on federal courts "a greater responsibility for determining and applying state laws in *all* cases within their jurisdiction in which federal law does not govern." *Meredith v. Winter Haven*, 320 U. S. 228, 237.

(7) Whether the trial court erred in permitting the Government to offer in evidence copies of the owner's tax rendition lists in three Oklahoma counties, for impeachment purposes, the issue being a purely collateral and immaterial matter, and in failing to apply local law.

In the cross-examination of the landowner, Chapman, counsel for the Government asked if the witness had testified he had from 3000 to 4500 head of cattle for the past ten years, and the witness stated he had had that many cattle at different times and different parts of the year (R. 67). Thereupon, the Government offered, for impeachment purposes, copies of the tax rendition lists which had been filed in three Oklahoma counties, showing the number of cattle rendered for ad valorem taxation in those counties (R. 67 171, 175, 243, 253, 446), and the court permitted counsel to cross-examine the witness at length on the contents of these exhibits. Counsel for the landowners objected to the evidence, but was not allowed by the court to state the grounds of the objection (R. 69).

These assessment lists were not admissible for three reasons:

(1) It is a rule of universal application, repeatedly announced in Oklahoma, that it is not proper to offer evidence to impeach a witness on a purely collateral or immaterial matter. Missouri, O. & G. Ry. Co. v. Adams, 52 Okla. 557, 153 P. 200; Weber v. Rusch, 117 Okla. 4, 245 P. 46; Harris Irby Cotton Co. v. Duncan, 57 Okla. 761, 157 P. 746; Bilby v. Brockman, 55 Okla. 714, 155 P. 257; Klein v. Muhlhausen, 83 Okla. 21, 200 P. 436; 70 C. J. 1046 and authorities cited. The test of admissibility of such impeaching evidence is whether it could be offered for any purpose other than to contradict the witness. Harris Irby Cotton Co. v. Duncan, supra. Certainly, the application of the test settles the question; the number of cattle which happened to be quartered in the feed lots on these lands for winter feeding on January first of any year would have no relation whatever to the value of this large body of land. *Furthermore, errors in admitting this character of testimony are not harmless, but prejudicial.* Missouri, O. & G. Ry Co. v. Adams, supra.

(2) Tax assessment lists are not admissible in Oklahoma for any purpose other than tax purposes. Champlin Refining Co. v. Donnell, 173 Okla. 527, 49 P. (2d) 208. See also In re United States Commission, 295 F. 950; Johnson and Wimsatt Inc. v. Reichelderfer, 50 F. (2d) 336. It is a matter of common knowledge that tax authorities do not uniformly assess on one hundred per cent valuations and, therefore, tax assessment lists are incompetent for any purpose other than those for which they are prepared.

(3) They were incompetent and no proper predicate had been laid for their admission. In Oklahoma livestock are assessed for taxation as to the number on hand on the first day of January of each year. 68 Okla. Stat. Ann. 15.8. There had been no evidence offered by petitioners as to the number of cattle Chap-

man had in Johnston County, or any other county, on the first day of January of any year. On the contrary, the evidence showed that cattle were bought and sold during the year, and the fact that any certain number of cattle may have been fed on the premises during some portion of a particular year did not furnish any proof whatever as to the number of cattle which was on the premises on January first. In no case did counsel attempt to show how many cattle Chapman had in any particular county on January first of any year, and without first establishing that fact the assessment lists would be incompetent for impeachment purposes under any rule.

This assignment was completely ignored by the Circuit Court of Appeals.

(8) Whether the trial court erred in holding that the witness, Woody Hunt, offered by the United States as a witness on value, was qualified under the Oklahoma rule.

One of the four witnesses offered by the Government on the value of the property was named Woody Hunt. He went over this land to appraise it for the first time in February 1947, or *two years and four months* after the land had been taken by the Government. His testimony was that prior to 1947 he had seen these lands when "driving along" by them, and that he had crossed small portions of it in appraising other lands "in the vicinity." He had seen very little of this land prior to February 1947, yet in February 1947 he attempted to place a valuation on it as of October 21, 1944 (R. 212-15). There is much evidence in the record as to changes which had taken place in the interim.

While the courts have been liberal in construing the qualifications of witnesses on value, it is submitted that this witness was not qualified under even the most liberal rule. The case of *Healdton Oil & Gas Co. v. Regnier*, 170 Okla. 271, 39 P. (2d) 973, is in point. There the court held that a witness as to the value of lands at stated periods should show himself to have been familiar with such values at such periods.

See also *Mary Jane Stevens Co. v. First National Building Co.*, 57 P. (2d) 1099, 1119, and *United States v. 13,255.53 Acres of Land* (CCA 3), 158 F. (2d) 874, where it is said that a witness to give his opinion on market value of land must show "that he has actual personal knowledge of the facts affecting the land *at the time of taking*."

The reason for such a rule is obvious. Conditions which affect the value of land vary from time to time. It isn't reasonable to assume that a witness inspecting a piece of land today could remember all of the conditions which might affect the value of the land on a certain date two years and four months prior to that time. In this particular case there had been many changes in the land since October 21, 1944. Due to the Government construction there had been many overflows; much of the land had "silted up"; there were large ponds of water which accumulated and became enlarged with each overflow; many sloughs and drainage ditches had become sealed by reason of the silt deposited; the channel of the river had almost become filled up with sand in a number of places; and there were large growths of cottonwood sprouts at

various locations, which had formerly been some of the most productive land in the area (R. 64, 65, 88, 89). Certainly, Hunt could not visualize the condition of the land in October 1944, since he saw it for the first time after all these changes had taken place. Furthermore, it would be a prodigious feat of memory for such a witness to be able to recall all the facts and circumstances which might have affected the value of the land two years and four months prior to the date of inspection, when there was no showing that anything had transpired on that date which would fix in the mind of the witness all of the circumstances affecting value at that time.

In its opinion, the Circuit Court of Appeals ignored the Regnier case from Oklahoma and cited two of its own opinions in support of the witness' qualifications,—*Bratt v. Western Air Lines*, 155 F. (2d) 850, and *Korth v. Zion's Saving Bank & Trust Co.*, 148 F. (2d) 170. These cases are not applicable here. The Bratt case arose in the State of Utah and does not involve land values; the Korth case was an internal revenue case and the question of qualification of the witness there is controlled by federal law.

It is submitted that the failure of the Circuit Court of Appeals to follow *Healdton Oil & Gas Co. v. Regnier*, supra, was error.

(9) Whether the trial court erred in instructing the jury that in determining the productivity of the land more weight should be given to evidence thereof in recent years than in years prior thereto.

This assignment is based on the following instructions given by the court to the jury (R. 227):

> "Some evidence is in here about the productivity of this land back in 1922, '24 along in there, *the further back the more remote it is, and the less weight should be given it. Just as I instructed you as to values paid for the land back in 1917 and 1918.*"

An examination of the record will reveal the prejudicial effect of this instruction. There was much evidence as to the adaptability of this land for alfalfa, and it was shown that alfalfa land was worth much more than any character of agricultural land in the area. Even the Government's witnesses testified that alfalfa land was worth $200 per acre or more. Two of the foremost authorities on soils in Oklahoma, Dr. H. J. Harper, Professor of Soils at Oklahoma A & M College and Director of the Oklahoma Soil Survey, and Vernon L. Horne, of the Soil Conservation Service, United States Department of Agriculture, testified that at least 2000 acres of this land was good alfalfa land (R. 118, 130, 131).

Both these men had made a survey of this area and Horne's testimony was based on the offical records of the Department of Agriculture. Eight other witnesses testified as to the production of alfalfa in years past. In recent years, however, the land had not been planted to alfalfa; the landowner explained that he was in the cattle business primarily, and it had been more important for him to raise corn to feed his cattle than it was to produce alfalfa on the land during the previous few years. There is not a line of testi-

mony in the record to show that the land was not as capable or adaptable for producing alfalfa at the date of the taking as it had been at any time in the past.

It will be seen, however, that the instruction of the court was in effect telling the jury that they should give little weight to the mass of evidence on adaptability of the land to growing alfalfa, simply because no alfalfa had been grown in recent years. Certainly, it is a misconception to say that productivity of lands changes with the passing of years simply because the *value* thereof may fluctuate from time to time.

There is no basis in the authorities for such a rule. In *Olson v. United States*, 292 U. S. 246, 255, this court said:

> "Just compensation includes all elements of value that inhere in the property, but it does not exceed market value fairly determined. The sum required to be paid the owner *does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.*"

Other authorities are mentioned in the footnote.[5]

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5 29 C. J. S. 1024; United States v. Powelson (CCA 4), 118 F. (2d) 79, 84; Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 408, 25 L. Ed. 206; Clark's Ferry Bridge Co. v. Public Service Comm., 291 U. S. 227, 54 S. Ct. 427, 78 L. Ed. 767; 2 Lewis, Eminent Domain (3rd Ed.), Sec. 707, p. 1233; 1 Nichols, Eminent Domain (2d. Ed.), Sec. 220, p. 671.

In none of these authorities is it even suggested that the value of lands should be reduced because they are not at the time being subjected to certain uses for which they are adaptable. On the contrary, the authorities guard against any such qualification.

No direct authority on this point has been found in Oklahoma. It is a rule of universal application, however, and it is submitted that the Supreme Court of Oklahoma would undoubtedly follow this court's ruling in the Olson case. Indeed, under the authority of *United States v. Miller*, 317 U. S. 369, this Court may hold that the federal rule is the applicable rule on this point.

Finally, in its opinion the Circuit Court of Appeals, in commenting upon one of the questions in the case, said that "no prejudice whatever is shown by the action of the court." But there is no burden upon an appellant to show that the error was harmless. On the contrary, this court has said that an erroneous ruling which relates to the substantial rights of a party is ground for reversal, unless it *affirmatively* appears from the *whole record* that it was not prejudicial. *McCandless v. United States*, 298 U. S. 342. In a former appeal of this case the Circuit Court of Appeals announced an even broader rule. *United States v. Chapman*, 158 F. (2d) 417. There the Government's only contention was that one juror in the case was disqualified, and the Circuit Court of Appeals reversed, without even finding that the trial court had abused its discretion in holding the juror qualified, and stated its

conception of harmless error in these words: "The suspicions of the Government may be more fanciful than real, but we are convinced that they are not wholly without foundation, and that, in our judgment, is sufficient."

It is submitted that an examination of the whole record will show that under the overwhelming amount of evidence in the case, a much larger verdict should reasonably have been expected, and it cannot be said that errors of the trial court did not affect the amount of the verdict.

For these reasons, therefore, it is respectfully submitted that the petition for certiorari should be granted, and that upon final hearing the Circuit Court of Appeals should be directed to reverse and remand this cause for a new trial.

Respectfully submitted,

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